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Mary Patricia Byrn

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Note

Same-Sex Marriage in South Africa: A Constitutional Possibility

Mary Patricia Byrn*

On December 10, 1996, South Africa's President, Nelson Mandela, signed into law what has been called the world's most enlightened constitution.¹ The South African Constitution includes a Bill of Rights that arguably protects more fundamental rights than any other constitution in the world.² In addition, South Africa was the first country specifically to outlaw discrimination on the basis of sexual orientation.³ Using this constitutional provision, the South African Constitutional Court⁴ has granted gays and lesbians significant

* J.D. Candidate 2003, University of Minnesota Law School; B.A. 1991, Loyola University Chicago, Chicago, IL. The author would like to thank Professor Dale Carpenter and Professor Pierre de Vos who provided advice integral to the development of this Note. Hansem (Dawn) Kim and Rebecca Bernhard provided helpful comments and suggestions. The author would like to thank the members of the *Minnesota Law Review* and, especially, Katherine M. Byrn.

1. Albie Sachs, *South Africa's Unconstitutional Constitution: The Transition from Power to Lawful Power*, 41 ST. LOUIS U. L.J. 1249, 1257 (1997).

2. Makua wa Mutua, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, 10 HARV. HUM. RTS. J. 63, 65 n.9 (1997). The Bill of Rights prohibits discrimination on almost every conceivable ground including race, gender, sex, pregnancy, marital status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, language, birth, and sexual orientation. S. AFR. CONST. ch. 2, § 9(3).

3. Craig Lind, *Politics, Partnership Rights and the Constitution in South Africa . . . (and the Problems of Sexual Identity)*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 279, 279 (Robert Wintemute & Mads Andenæs. eds., 2001).

4. "The Constitutional Court - (a) is the highest court in all constitutional matters; (b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and (c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter." S. AFR. CONST. ch. 8, § 167(3). See Richard J. Goldstone, *The South African Bill of Rights*, 32 TEX. INT'L L.J. 451, 458-59 (1997) (describing the role of the Constitutional Court and judicial review under the new Constitution).

victories in cases regarding sodomy,⁵ immigration,⁶ spousal benefits,⁷ and adoption.⁸ The next step in granting gays and lesbians full substantive rights under the South African Constitution is to grant homosexuals the right to legally marry.

A case challenging the constitutionality of the ban on same-sex marriage⁹ under South Africa's Constitution was argued before the Pretoria High Court on October 15, 2002.¹⁰ When this issue is appealed to the Constitutional Court,¹¹

5. See Nat'l Coalition for Gay and Lesbian Equal. v. Minister of Justice, 1999 (1) SALR 6, 44 (CC) (holding that the common law and statutory crimes of sodomy and unnatural sex acts were unconstitutional). For a discussion of the case and the Court's analysis see *infra* Part II.A.

6. See Nat'l Coalition for Gay and Lesbian Equal. v. Minister of Home Affairs, 2000 (2) SALR 1, 47 (CC) (holding that section 25(5) of the Aliens Control Act of 1991 was unconstitutional because it facilitated the immigration of spouses of permanent South African residents, but did not afford the same benefits to same-sex life partners). For a discussion of the case and the Court's analysis see *infra* Part II.B.

7. See Satchwell v. President of the Republic of South Africa, No. CCT 45/01, ¶ 23 (CC July 25, 2002), <http://www.concourt.gov.za/judgments/2002/satchwell.pdf> (holding that sections 8 and 9 of the Judge's Remuneration and Conditions of Employment Act 88 of 1989 were unconstitutional because the provisions afforded benefits to spouses but not to same-sex partners with substantially similar relationships). For a discussion of the case and the Court's analysis see *infra* Part II.C.

8. Du Toit v. Minister of Welfare and Population Dev., No. CCT 40/01, ¶¶ 25-26 (CC Sept. 10, 2002), <http://www.concourt.gov.za/judgments/2002/dutoit.pdf> (holding that sections 17(a) and (c) of the Child Care Act were unconstitutional because the provisions unfairly discriminate between applicants that are married and same-sex couples). The opinion in this case is not analyzed in this Note because the decision came down after submission for publication.

9. For a discussion of the common law ban on same-sex marriage in South Africa see *infra* Part III.

10. Nicolize Mulder, *Lesbiërs se Trou-aansoek Uitgestel*, BEELD, August 5, 2002, <http://152.111.1.42/argiewe/beeld.html> (on file with author). The High Court judge dismissed the lesbian couple's application to get married because the "matter was of a constitutional nature and [] he was not prepared to exercise his own discretion." The couple intends to appeal. Lesbian and Gay Equality Project, *South Africa Dismisses Marriage Case*, at <http://www.equality.org/news/2002/10/20marry.htm> (on file with author). The opinion in this case is not analyzed in this Note because the decision came down after submission for publication.

11. The Constitutional Court is the highest court in South Africa for all constitutional matters and, therefore, will be the final arbiter of a case arguing for same-sex marriage. *Information about the Constitutional Court of South Africa*, at <http://www.concourt.gov.za/about.html> (last visited Oct. 29, 2002). Anyone wishing to bring a constitutional case before the Constitutional Court must usually start in the High Court. The High Court has the power to award relief including the invalidation of legislation. The Constitutional Court,

whether in this case or under a future challenge to the marriage law, the Court¹² will have the opportunity to recognize same-sex marriage as an explicit constitutional right. Based on the historical, textual, and precedential arguments favoring gays and lesbians in South Africa, this Note argues that the Constitutional Court must find the ban on same-sex marriage unconstitutional.

Section I of this Note will discuss some of the key provisions of the South African Bill of Rights that will effect the Court's consideration of same-sex marriage. Gays and lesbians in South Africa have strong textual arguments for the recognition of same-sex marriage based on the explicit language in the Constitution protecting sexual orientation. Section II will review the development of the Constitutional Court's Bill of Rights jurisprudence. The Constitutional Court has addressed sodomy, immigration, spousal benefits, and adoption under the sexual orientation provision and has outlined a clear analytical framework under the right to equality. Section III will consider same-sex marriage within the framework of the South African Constitution and the jurisprudence of the Constitutional Court to determine how the Court should resolve the issue of whether same-sex marriage should be recognized as a constitutional right. This section will consider the textual and precedential arguments for same-sex marriage, as well as some of the social arguments against recognizing full marriage rights for gays and lesbians. This Note concludes that denying homosexual couples the right to marry is unconstitutional under the South African Constitution.

I. THE SOUTH AFRICAN CONSTITUTION

South Africa's Constitution was written in response to the incredible injustices suffered by a majority of South Africans under Apartheid.¹³ The extreme oppression experienced during

however, must confirm an order for invalidity before it has any effect. If the High Court does not award relief, the case can be appealed to the Constitutional Court, but the Constitutional Court is not required to hear the case. *Id.*

12. Use of the word "Court" in this Note will refer to the South African Constitutional Court. References to any other court will include the full name, e.g., the U.S. Supreme Court.

13. Daisy M. Jenkins, *From Apartheid to Majority Rule: A Glimpse into South Africa's Journey Towards Democracy*, 13 ARIZ. J. INT'L & COMP. L. 463, 479-80 (noting that "[f]or the first time ever, South Africa has a constitution

Apartheid crystallized the anti-discrimination sentiment in South Africa and resulted in a Constitution that refuses to tolerate discrimination on almost any level.¹⁴ The anti-discriminatory purpose and explicit textual provisions of the South African Constitution provide strong arguments in favor of recognizing same-sex marriage as a fundamental right.

A. THE CONSTITUTIONAL PURPOSE

The preamble to the Constitution states that one of the purposes of the Constitution is to “[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.”¹⁵ In *President of the Republic of South Africa v. Hugo*, the Court stated that

the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership [in] particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.¹⁶

In an attempt to reach this goal, the drafters made equality the fundamental value of the Constitution.¹⁷ When

which guarantees that all people have equal rights”). In 1948, after gaining control of the South African Parliament in all-white elections, the National Party (NP) began formalizing Apartheid as the official ideology of the South African government. *Id.* at 470-71. The NP believed that the only way to secure white dominance was through the separation of the races and passed laws that required everyone to be classified according to their race, proscribed interracial sex and marriage, segregated racial groups in different areas, and required segregation of public facilities. *Id.*

14. Jeremy Sarkin, *The Drafting of South Africa's Final Constitution From a Human-Rights Perspective*, 47 AM. J. COMP. L. 67, 68 (1999). By the late 1980s, the increasing violence within South Africa and the mounting international economic pressure to end Apartheid pushed then President F.W. de Klerk to lift the ban on opposition political parties, release hundreds of political prisoners, and announce his commitment to a negotiated political settlement and the creation of a bill of fundamental rights. RIGHTS AND CONSTITUTIONALISM: THE NEW SOUTH AFRICAN LEGAL ORDER 131 (Dawid van Wyk et al. eds., 1994). The opposition political parties, led by the African National Congress (ANC), were also firmly committed to forming a nation based on human rights. The ANC first embodied the principle elements of a Bill of Rights in its Freedom Charter in 1955. Goldstone, *supra* note 4, at 452. The ANC later concretized this goal in a working draft of a Bill of Rights in 1992. Mutua, *supra* note 2, at 77.

15. S. AFR. CONST. pmbl.

16. No. CCT 11/96, ¶ 41 (CC Apr. 18, 1997), <http://www.concourt.gov.za/judgments/1997/hugo.pdf>.

17. See JOHAN DE WAAL ET AL., THE BILL OF RIGHTS HANDBOOK 153 (1998) (noting that a comprehensive textual commitment to equality was

interpreting the Bill of Rights, the Constitutional Court has stated that “[t]here can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised.”¹⁸ This Constitutional goal of equal dignity and respect for all is central to the argument for same-sex marriage.

B. THE RIGHT TO EQUALITY

The first right specifically outlined in the South African Bill of Rights is the right to equality.¹⁹ At the center of this provision is the principle of anti-discrimination based on *unfair* discrimination.²⁰ In order for a constitutional challenge based on the equality provision to succeed, there must be more than a general claim to equality.²¹ Instead, the claimant will need to frame the matter as one of *unfair* discrimination.²² In this way, the Court has refused to focus only on the issues of sameness

essential to creating a new legal and political order in light of South Africa’s history of state-sanctioned inequality).

18. *Fraser v. Children’s Court*, No. CCT 31/96, ¶ 20 (CC Feb. 5, 1997), <http://www.concourt.za/judgments/1997/fraser.pdf> (holding that the provision in the Child Care Act of 1983 dispensing with the need to obtain a father’s consent for the adoption of his illegitimate child violated the father’s constitutional right to equality).

19. S. AFR. CONST. ch. 2, § 9. The equality provision provides as follows:

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, *sexual orientation*, age, disability, religion, conscience, belief, culture, language, and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds in subsection (3) is unfair unless it is established that the discrimination is fair.

Id. (emphasis added).

20. See Pierre de Vos, *Sexual Orientation and the Right to Equality in the South African Constitution: National Coalition for Gay and Lesbian Equality & Another v. Minister of Justice & Others*, 117 S. AFR. L.J. 17, 18-19 (2000).

21. *Id.* at 19.

22. *Id.*

and similar treatment,²³ but instead “examine[s] the actual economic, social, and political conditions of groups and individuals in order to determine whether the Constitution’s commitment to equality is being upheld.”²⁴ In other words, rather than looking merely at the form of the discrimination, the Court will look at the *actual* discrimination and its *impact* on the disfavored group.²⁵ In addition, the Court looks not only at the past effects of the discrimination, but at its future impact as well.²⁶

The Constitutional Court has outlined a multi-stage analysis when considering the equality provision in the Bill of Rights.²⁷ The Court initially asks whether the provision differentiates between people or categories of people.²⁸ Second, the Court asks if the differentiation amounts to discrimination.²⁹ If the differentiation is based on one of the grounds listed in the equality provision, such as sexual orientation, then discrimination will have been established.³⁰

23. *Id.* (noting that the Constitutional Court’s substantive approach to equality takes into consideration the lingering effects of past discrimination rather than operating on the assumption that legal equality will result in social equality).

24. DE WAAL ET AL., *supra* note 17, at 155.

25. *Id.*

26. *See* Nat’l Coalition for Gay and Lesbian Equal. v. Minister of Justice, 1999 (1) SALR 6, 38-39 (CC). The Court stated the following:

It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions that have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied.

Id.

27. *See, e.g., id.* at 22-25 (holding that the common law and statutory law crimes of sodomy violated the rights to equality, privacy, and human dignity); *Prinsloo v. Van der Linde*, No. CCT 4/96, ¶¶ 15-34 (CC Apr. 18, 1997), <http://www.concourt.gov.za/judgments/1997/prinsloo.pdf> (holding that the Forest Act’s presumption of negligence in certain circumstances did not violate the defendant’s right to equality); *President of the Republic of South Africa v. Hugo*, No. CCT 11/96, ¶ 33 (CC Apr. 18, 1997), <http://www.concourt.gov.za/judgments/1997/hugo.pdf> (holding that a Presidential pardon of mothers in prison with minor children under the age of twelve did not unfairly discriminate against fathers in prison with minor children).

28. *Hugo*, No. CCT 11/96, ¶ 33, <http://www.concourt.gov.za/judgments/1997/hugo.pdf>.

29. *Id.*

30. *Id.* If the differentiation is not on a specified ground, then whether or

Finally, if the differentiation amounts to discrimination, the Court will ask whether the discrimination is unfair.³¹ If the discrimination is on one of the grounds listed, unfairness will be presumed unless it is established that the discrimination is fair.³²

C. THE RIGHTS TO PRIVACY AND HUMAN DIGNITY

The Bill of Rights also contains provisions protecting the rights to privacy and human dignity. The privacy provision states that “[e]veryone has the right to privacy.”³³ This includes a person’s right to be left alone, as well as to seek self-realization and fulfillment.³⁴ In *Bernstein v. Bester NO*, the Constitutional Court described the right to privacy as being closely related to the concept of identity.³⁵ The Court stated that the right to privacy includes the “right to establish and maintain relations with other human beings for the fulfillment of one’s personality.”³⁶ The right to privacy, therefore, protects not only one’s right to physical space, such as one’s body or home; it also protects private decisions, such as whether to have sexual relations with someone or not.³⁷

The constitutional provision protecting human dignity states that “[e]veryone has inherent dignity and the right to have their dignity respected and protected.”³⁸ The right to

not there is discrimination will depend on whether the differentiation “is based on attributes and characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a comparably serious manner.” *Nat’l Coalition for Gay and Lesbian Equal. v. Minister of Justice*, (1) SALR at 24.

31. See *Hugo*, No. CCT 11/96, ¶ 33, <http://www.concourt.gov.za/judgments/1997/hugo.pdf>.

32. *Id.* This case also serves as an example of a situation where the Constitutional Court held that discrimination on the basis of sex was fair. See *id.* ¶ 47 (holding that pardoning female prisoners with young children, but not male prisoners with young children, did not amount to unfair discrimination).

If the discrimination is on an unspecified ground, then the complainant will have to establish unfairness. The test for unfairness focuses on the impact of the discrimination on the complainant or members of the affected group. *Nat’l Coalition for Gay and Lesbian Equal. v. Minister of Justice*, (1) SALR at 24.

33. S. AFR. CONST. ch. 2, § 14.

34. DE WAAL ET AL., *supra* note 17, at 212-13.

35. 1996 (2) SALR 751, 788 (CC).

36. *Id.* at 791 (citations omitted).

37. DE WAAL ET AL., *supra* note 17, at 213.

38. S. AFR. CONST. ch. 2, § 10.

human dignity is a preeminent value in the Constitution³⁹ and is listed in the Constitution as one of the founding values of South Africa.⁴⁰ The right to human dignity implies respect for all of a person's rights and the impairment of dignity will constitute a critical test of whether another fundamental right has been violated.⁴¹

D. THE LIMITATION OF RIGHTS

If any of the rights protected in the Bill of Rights are infringed, the government can still argue that the limitation is reasonable and justifiable pursuant to section 36 of the Constitution.⁴² This provision requires a court to determine whether a limitation has a reasonable purpose and is achieved through reasonable means by considering the proportionality between the limitation's effect and its objectives.⁴³ This analysis involves determining the relationship between the right being limited and the creation of a democracy based on human dignity, equality, and freedom.⁴⁴ Thus, "the closer the relationship the less generous should the court be in its decision to uphold a limitation of such right."⁴⁵

E. INTERPRETING THE CONSTITUTION

The last section of the Bill of Rights provides guidelines as

39. DENNIS DAVIS ET AL., *FUNDAMENTAL RIGHTS IN THE CONSTITUTION* 70 (Dennis Davis et al. eds., 1997).

40. S. AFR. CONST. ch. 1, § 1.

41. DAVIS ET AL., *supra* note 39, at 74-75.

42. See S. AFR. CONST. ch. 2, § 36. This section states:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including -

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

Id.

43. See Goldstone, *supra* note 4, at 461-62 (discussing this dual test for reasonableness).

44. DAVIS ET AL., *supra* note 39, at 319.

45. *Id.*

to the approach courts should take when interpreting the Bill of Rights.⁴⁶ This section promotes a purposive approach to constitutional interpretation.⁴⁷ Such an approach requires courts to go beyond the words of the text to employ a "value-oriented interpretive theory."⁴⁸ The Constitutional Court confirmed this understanding in two 1995 cases when it held that individual provisions should be construed in the context of the overall purpose of the Constitution and in reference to other fundamental rights.⁴⁹

Section 39 also provides that "international agreements . . . and international customary law are binding law unless they contradict the Constitution or other laws passed by Parliament"⁵⁰ and that the Court may consider foreign law.⁵¹ The Constitutional Court has stated, however, that cases decided in other countries will not necessarily provide clear resolutions to issues involving the interpretation of the South African Bill of Rights.⁵² Various statements from the Court have warned against the use of foreign law because of the "different contexts within which other constitutions were drafted, the different social structures and milieu existing in those countries as compared with those in this country, and the

46. S. AFR. CONST. ch. 2, § 39. This section states:

- (1) When interpreting the Bill of Rights, a court, tribunal or forum -
 - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international law; and
 - (c) may consider foreign law.

Id.

47. See Goldstone, *supra* note 4, at 459 (referring to section 35 of the interim Constitution). The corresponding provision to section 35 in the final Constitution is section 39. See DAVIS ET AL., *supra* note 39, at 334; Goldstone, *supra* note 4, at 459 n.32.

48. Brian Currin and Johan Kruger, *The Protection of Fundamental Rights in the Constitution of the Republic of South Africa, 1993: A Brief Contextualization*, in INTERPRETING A BILL OF RIGHTS 132, 133 (Johan Kruger & Brian Currin eds., 1994).

49. See *State v. Mhlungu*, 1995 (3) SALR 867, 874 (CC) (stating that courts should interpret laws "with regard to the objectives of the Constitution"); *State v. Makwanyane*, 1995 (3) SALR 391, 403-04 (CC) (indicating that provisions of the Constitution should be considered in relation to the entire Constitution and the rights it encompasses).

50. Mutua, *supra* note 2, at 66.

51. S. AFR. CONST. ch. 2, § 39.

52. Jeremy Sarkin, *The Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions*, 1 U. PA. J. CONST. L. 176, 197 (1998).

different historical backgrounds against which the various constitutions came into being.”⁵³

II. THE CONSTITUTIONAL COURT’S JURISPRUDENCE REGARDING SEXUAL ORIENTATION

The Constitutional Court has decided four cases to date in which it interpreted the sexual-orientation provision in the Constitution.⁵⁴ These cases were overwhelming victories for gays and lesbians and present strong precedential arguments favoring the recognition of same-sex marriage. In addition, the Court touched on the issue of same-sex marriage in all four cases, sometimes even appearing to go out of its way to light the path for the recognition of same-sex marriage.

53. *Id.* (quoting *Park-Ross v. Director, Office of Serious Economic Offenses*, 1995 (2) SALR 148, 160 (CC)); see also Richard Cameron Blake, *The Frequent Irrelevance of US Judicial Decisions in South Africa*, 15 S. AFR. J. ON HUM. RTS. 192, 197 (1999). The Court has stated the following:

The Constitutional Court has examined many cases from a number of foreign countries. The court will have regard for authorities from a foreign country, but if there are significant differences between that country and the South African legal system, our history and circumstances, and the structure and language of our own Constitution, it does not feel obligated to follow those authorities. In particular, the Court does not appreciate advocates throwing out numerous foreign authorities in support of arguments without explaining their application in the South African context. Finally, the Court looks first to principles and doctrines it has established in its previous cases and uses foreign decisions ‘particularly where principles have not yet been established.’

Id. (citations omitted).

54. See *Nat’l Coalition for Gay and Lesbian Equal. v. Minister of Justice*, 1999 (1) SALR 6, 44 (CC) (holding that the common law and statutory crimes of sodomy and unnatural sex acts were unconstitutional); *Nat’l Coalition for Gay and Lesbian Equal. v. Minister of Home Affairs*, 2000 (2) SALR 1, 47 (CC) (holding that section 25(5) of the Aliens Control Act of 1991 was unconstitutional because it facilitated the immigration of spouses of permanent South African residents, but did not afford the same benefits to same-sex life partners); *Satchwell v. President of the Republic of S. Africa*, No. CCT 45/01, ¶ 23 (CC July 25, 2002), <http://www.concourt.gov.za/judgments/2002/satchwell.pdf> (holding that sections 8 and 9 of the Judge’s Remuneration and Conditions of Employment Act 88 of 1989 were unconstitutional because the provisions afforded benefits to spouses but not to same-sex partners with substantially similar relationships); *Du Toit v. Minister of Welfare and Population Dev.*, No. CCT 40/01, ¶¶ 25-26 (CC Sept. 10, 2002), <http://www.concourt.gov.za/judgments/2002/dutoit.pdf> (holding that sections 17(a) and (c) of the Child Care Act were unconstitutional because the provisions unfairly discriminate between applicants that are married and same-sex couples). The opinion in the Adoption Case is not analyzed in this Note because the decision came down after submission for publication.

A. THE SODOMY CASE

In *National Coalition for Gay and Lesbian Equality v. Minister of Justice*,⁵⁵ the Constitutional Court affirmed a High Court decision holding that various common law and statutory crimes of sodomy and unnatural sex acts⁵⁶ were unconstitutional based on the rights to equality, privacy, and human dignity.⁵⁷ The Court's decision can be considered a unanimous judgment that "clearly enunciated the court's view on homosexuality and sexual identity in the light of the equality guarantee in the Constitution."⁵⁸

The Court began by framing its analysis in terms of the purpose of the equality provision to prohibit patterns of group disadvantage and harm.⁵⁹ The Court then defined sexual orientation not as a sexual act, but as a matter of "sexual

55. The complainants were the National Coalition for Gay and Lesbian Equality and the South African Human Rights Commission. The Coalition was a "voluntary association of gay, lesbian, bisexual and transgendered people in South Africa and of 70 organisations and associations representing gay, lesbian, bisexual and transgendered people in South Africa." See *Nat'l Coalition for Gay and Lesbian Equal. v. Minister of Justice*, (1) SALR at 16-17. The Commission was established under section 184 of the 1996 Constitution to "promote respect for human rights and a culture of human rights" and to "promote the protection, development and attainment of human rights." S. AFR. CONST. ch. 9, § 184.

56. The common law offense of sodomy was defined as "unlawful and intentional sexual intercourse per anum between human males" whether consensual or not. de Vos, *supra* note 20, at 18 (citing Jonathan Burkell & John Milton, *PRINCIPLES OF CRIMINAL LAW* 632 (2d ed. 1997)). The challenged statutory provisions included the following sections:

[Section] 20A of the Sexual Offences Act 23 of 1957, which prohibited acts 'calculated to stimulate passion or to give sexual gratification' between two men 'at a party'; the provision in Schedule 1 of the Criminal Procedure Act 51 of 1977 which refers to sodomy; and the provision in the Schedule to the Security Officers Act 92 of 1987 that refers to sodomy.

Id.

57. See *Nat'l Coalition for Gay and Lesbian Equal. v. Minister of Justice*, (1) SALR at 28.

58. de Vos, *supra* note 20, at 17. Justice Ackermann wrote the majority judgment, with whom the rest of the Court concurred. Justice Sachs wrote a separate concurring judgment. Justice Ackerman in turn agreed with Justice Sachs's judgment, making it possible to treat the two judgments as one judgment. Angelo Pantazis, *How to Decriminalise Gay Sex: National Coalition for Gay & Lesbian Equality v. Minister of Justice*, 15 S. AFR. J. ON HUM. RTS. 188, 188 (1999).

59. *Nat'l Coalition for Gay and Lesbian Equal. v. Minister of Justice*, (1) SALR at 23.

attraction.”⁶⁰ The Court acknowledged that homosexuals fit the profile of a minority, similar to blacks, women, ethnic groups, or religious minorities because they all experience discrimination.⁶¹ In other words, the Constitution seeks to protect homosexuals not because they are different, but because they are treated differently.⁶² Under this analysis, the Court did not pass judgment on homosexuality as a lifestyle, but instead focused on the fact that homosexuals are a vulnerable group that is constitutionally protected from discrimination.

In applying the equality analysis, the Court went on to determine whether sodomy differentiates between people or classes of people, whether that differentiation amounts to discrimination, and whether that discrimination is unfair.⁶³ The Court found differentiation when it compared the proscribed conduct with conduct that is not illegal⁶⁴ and determined that this differentiation was discriminatory because it was based on sexual orientation. The Court devoted the majority of the opinion to discussing why this differentiation amounted to unfair discrimination towards homosexuals. According to the Court, it is the impact of discrimination on the members of the affected group that is the determining factor regarding the unfairness of discrimination.⁶⁵ In finding the discrimination to be unfair, the Court pointed to the psychological effect of the law on homosexuals as well as the societal prejudice and stigma the law reinforced.⁶⁶

60. *Id.* at 25.

61. Pantazis, *supra* note 58, at 191.

62. *Id.* at 191-92.

63. *Nat'l Coalition for Gay and Lesbian Equal. v. Minister of Justice*, (1) SALR at 23-24.

64. *Id.* at 22. The sodomy laws prohibited sex between men, but there were no laws prohibiting private sex between consenting adult females or between a consenting adult male and an adult female. *Id.*

65. *Id.* at 19.

66. Pantazis, *supra* note 58, at 191. In finding the discrimination to be unfair, the Court stated the following:

(a) The discrimination is on a specified ground. Gay men are a permanent minority in society and have suffered in the past from patterns of disadvantage. The impact is severe, affecting the dignity, personhood and identity of gay men at a deep level. It occurs at many levels and in many ways and is often difficult to eradicate.

(b) The nature of the power and its purpose is to criminalize private conduct of consenting adults which causes no harm to anyone else. It has no other purpose than to criminalise conduct which fails to conform with the moral or religious views of a section of society.

Once the Court determined that the sodomy laws did constitute unfair discrimination, it then considered the government's argument that the laws should be upheld pursuant to the limitations clause. On one side, the Court weighed the "severe" limitation of a gay man's right to equality, privacy, dignity, and freedom.⁶⁷ On the other side, the Court found no legitimate purpose or justification.⁶⁸ In addition, the Court emphasized that "[t]he enforcement of the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice, cannot qualify as . . . a legitimate purpose."⁶⁹

The Court also found that the sodomy laws violated the rights to human dignity and privacy.⁷⁰ The Court found that a law that punishes a form of sexual conduct regardless of the relationship of the couple violated the right to human dignity in that it "degrades and devalues gay men in our broader society."⁷¹ In finding the offense of sodomy to be unconstitutional on the basis of the right to privacy, the Court held that everyone has a right to private intimacy that allows people to "establish and nurture human relationships without interference from the outside community."⁷² Justice Sachs went on to declare that "[i]t is not for the state to choose or to arrange the choice of [a] partner, but for the partners to choose themselves."⁷³ The Court emphasized that the fact that the sodomy laws violated the rights to equality, dignity, and privacy "highlights just how egregious the invasion of the constitutional rights of gay persons has been" in South Africa.⁷⁴

(c) The discrimination has . . . gravely affected the rights and interests of gay men and deeply impaired their fundamental dignity. *Nat'l Coalition for Gay and Lesbian Equal. v. Minister of Justice*, (1) SALR at 27.

67. *Id.* at 31. The Court considered how the harm from the sodomy laws affects a gay man's ability to "achieve self-identification and self-fulfillment," fosters further discrimination in society, and prevents a "fair distribution of social goods and services and the award of social opportunities for gays." *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 28.

71. *Id.* at 29.

72. *Id.* at 30.

73. *Id.* at 61 (Sachs, J., concurring).

74. *Id.* at 30. In considering foreign law pursuant to section 39, Justice Ackermann stated that "[t]here is nothing in the jurisprudence of other open and democratic societies based on human dignity, equality and freedom which would lead me to a different conclusion." *Id.* at 32.

The Court did acknowledge that this issue “touch[es] on deep convictions and evoke[s] strong emotions”⁷⁵ for many South Africans, but took the view that “[t]here is no single, superior perspective for judging questions of difference, of who is normal and who is not and of which differences are morally or ethically irrelevant and which ones are not.”⁷⁶ The Court was unequivocal on this point holding that “what is constitutionally normal is expanded to include the widest range of perspectives and to acknowledge, accommodate and accept the largest spread of difference.”⁷⁷ The Court was careful not to condemn people who held differing religious beliefs, but affirmed the fact that “while the Constitution protects the right of people to continue with such beliefs, it does not allow the state to turn these beliefs—even in moderate or gentle versions—into dogma imposed on the whole of society.”⁷⁸

B. THE IMMIGRATION CASE

The second case involving sexual orientation decided by the Constitutional Court was *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs*.⁷⁹ In that case, the Constitutional Court affirmed a High Court holding that section 25(5) of the immigration law was unconstitutional.⁸⁰ Section 25(5) facilitated the immigration into South Africa of

75. *Id.*

76. de Vos, *supra* note 20, at 21.

77. *Nat'l Coalition for Gay & Lesbian Equal. v. Minister of Justice*, (1) SALR at 68.

78. *Id.* at 69.

79. 2000 (2) SALR 1 (CC). The Court stated the following:

The first applicant is a voluntary association of individual gay, lesbian, bisexual and transgendered people in South Africa and of 69 organisations and associations representing such people. Its principal objectives include the promotion of equality before the law for all persons, irrespective of their sexual orientation; the reform and repeal of laws that discriminate on the basis of such orientation; the promotion and sponsoring of legislation to ensure equality and equal treatment of people in respect of their sexual orientation; and to challenge by means of litigation, lobbying, advocacy and political mobilization all forms of discrimination on the basis of such orientation. The second to seventh applicants, none of whom is a South African citizen, are the ‘same-sex life partners’ of the eighth to the 13th applicants respectively. The eighth to the 13th applicants (the South African partners) are all permanently and lawfully resident in South Africa. The 14th applicant is the Commission for Gender Equality.

Id. at 16-17.

80. *See id.* at 10.

the spouses of permanent South African residents, but did not afford the same benefits to same-sex life partners of permanent South African residents.⁸¹

The Constitutional Court analyzed the constitutionality of section 25(5) under the rights to equality and human dignity simultaneously.⁸² Following the approach laid down in previous cases, including the Sodomy Case, the Court held that the law differentiated between heterosexual married couples and same-sex life partners in that it failed to extend the same advantages or benefits to foreign same-sex partners that it extended to spouses.⁸³ Accordingly, the Court found that the law differentiated between persons on the grounds of sexual orientation and marital status, both of which are listed in the equality provision, and therefore was presumed to constitute discrimination.⁸⁴

The Court then sought to determine whether the discrimination was unfair. Again relying on previous cases, the Court stated that the "determining factor regarding the unfairness of discrimination is . . . the impact of the discrimination on . . . the members of the affected group."⁸⁵ In determining the impact of section 25(5), the Court focused on the past and continuing discrimination of gays and lesbians:

The denial of equal dignity and worth [to gays and lesbians] all too quickly and insidiously degenerates into a denial of humanity and leads to inhuman treatment by the rest of society in many ways. This is deeply demeaning and frequently has the cruel effect of undermining the confidence and sense of self-worth and self-respect of lesbians and gays.⁸⁶

The Court acknowledged that in other countries there has been a change in societal and legal attitudes regarding family, and that in countries such as Canada, Israel, the United Kingdom, and the United States, there has been an increased

81. *Id.*

82. *Id.* at 23.

83. *Id.* at 23-24.

84. *Id.* at 26. The Court stated that

[t]he prerequisite of marriage before the benefit is available points to that element of the discrimination concerned with marital status, while the fact that no such benefit is available to gays and lesbians engaged in the only form of conjugal relationship open to them in harmony with their sexual orientation represents discrimination on the grounds of sexual orientation.

Id.

85. *Id.* at 27.

86. *Id.* at 28.

understanding and sensitivity "towards human diversity in general and to gays and lesbians and their relationships in particular."⁸⁷ That said, the Court held that the impact of section 25(5) was to reinforce "harmful and hurtful stereotypes of gays and lesbians."⁸⁸ One such hurtful stereotype the Court referred to was the tendency to grant heterosexual relationships more importance due to the ability of couples in those relationships to procreate.⁸⁹ The Court took issue with defining conjugal relationships based on the ability to procreate, finding it demeaning both to same-sex couples and to heterosexual couples who are unable or unwilling to procreate.⁹⁰ The Court went on to state that by reinforcing existing prejudices and stereotypes, section 25(5) constituted a "crass, blunt, cruel and serious" invasion of homosexuals' dignity.⁹¹

In exploring these harmful stereotypes, the Court admitted that "there is still no appropriate recognition in our law of the same-sex life partnership, *as a relationship*, to meet the legal and other needs of its partners."⁹² The Court made it clear that the complainants would have married each other if the law permitted them to do so,⁹³ and dismissed the argument that the immigration law did not discriminate against gays and lesbians because they were free to marry someone of the opposite sex if they so chose.⁹⁴ The Court stated that gays and lesbians have a *constitutional* right "to express [their sexual] orientation in a relationship of their own choosing,"⁹⁵ and that section 25(5) is unconstitutional because it denies benefits to gays and lesbians who are in the only form of conjugal relationship that is in "harmony with their sexual orientation."⁹⁶

In considering the limitation provision, the Court concluded that there was no rational connection between the exclusion of same-sex life partners from the benefits of section 25(5) and the government interest of protecting families and

87. *Id.* at 30.

88. *Id.* at 31.

89. *See id.*

90. *Id.* at 31-32.

91. *Id.* at 33.

92. *Id.* at 25.

93. *Id.* at 17.

94. *Id.* at 25.

95. *Id.* at 26.

96. *Id.* at 25.

the family life of heterosexual spouses.⁹⁷ Justice Ackermann stated that “protecting the traditional institution of marriage as recognized by law may not be done in a way which unjustifiably limits the constitutional rights of partners in a permanent same-sex life partnership.”⁹⁸ Reframing the argument put forth by the government that traditional families must be protected, the Court stated that

“in some ways, the debate about family presents society with a false choice. It is possible to be pro-family without rejecting less traditional family forms. It is not anti-family to support protection for non-traditional families. The traditional family is not the only family form and non-traditional family forms may equally advance true family values.”⁹⁹

C. THE SPOUSAL BENEFITS CASE

In *Satchwell v. President of the Republic of South Africa*, the Constitutional Court confirmed a High Court order declaring the Judges Remuneration and Conditions of Services Act unconstitutional to the extent that the Act afforded benefits to the spouses of judges but not to their same-sex life partners.¹⁰⁰ The complainant was a judge who had been involved in an “intimate, committed, exclusive and permanent relationship since about 1986.”¹⁰¹ The Court went on to state that “[a]lthough not married . . . they live in every respect as a married couple and are acknowledged as such by their respective families and friends.”¹⁰²

The Court held that the Act violated the equality provision of the Constitution because it provided benefits to spouses, but not to same-sex partners.¹⁰³ In its analysis, the Court pointed to its recognition of different forms of life partnerships in the Immigration Case as well as to “woman-to-woman” marriages in traditional African societies.¹⁰⁴ In addition, the Court stated

97. *Id.* at 33-34.

98. *Id.* at 33.

99. *Id.* at 34 n.76 (quoting Canada [Attorney-Gen.] v. Mossop [1993] 100 D.L.R. (4) 658, 712).

100. *Satchwell v. President of the Republic of S. Africa*, No. CCT 45/01 (CC July 25, 2002), <http://www.concourt.gov.za/judgments/2002/satchwell.pdf>. The Act provides for the payment to the surviving spouse of a deceased judge two-thirds of the salary that would have been payable to that judge as well as other benefits. *Id.* ¶ 7.

101. *Id.* ¶ 4.

102. *Id.*

103. *See id.* ¶ 25.

104. *Id.* ¶ 12.

that "families come in many shapes and sizes. The definition of the family also changes as social practices and traditions change. In recognizing the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms."¹⁰⁵ Perhaps due to the strong holdings in the Sodomy and Immigration Cases, the government did not argue that the law should be upheld pursuant to the limitation provision and conceded that "permanent same-sex life partners are entitled to found their relationships in a manner which accords with their sexual orientation and further that such relationships ought not to be the subject of unfair discrimination."¹⁰⁶

In its analysis the Court continued to build on its previous exposition of same-sex marriage when it stated that

[t]he benefits accorded to spouses of judges by the legislation are accorded to them because of the importance of marriage in our society and because judges owe a legal duty of support to their spouses. In terms of our common law, marriage creates a physical, moral and spiritual community of law that imposes reciprocal duties of cohabitation and support. The formation of such relationships is a matter of profound importance to the parties, and indeed to their families and is of great social value and significance. However, as I have indicated above, historically our law has only recognized marriages between heterosexual spouses. This narrowness of focus has excluded many relationships that create similar obligations and have a similar social value.¹⁰⁷

III. SAME-SEX MARRIAGE UNDER THE SOUTH AFRICAN CONSTITUTION

Marriage in South Africa is currently defined as the "legally recognized life-long voluntary union between one man and one woman to the exclusion of all other persons."¹⁰⁸ This definition predates the new Constitution and does not reflect the goals of the new South Africa. The common law ban on homosexual marriage violates the equality provision of the Constitution, as well as the Constitutional rights to human dignity and privacy. In addition, there are no reasonable and justifiable reasons, as required by the Constitution, for limiting

105. *Id.* ¶ 13 (citations omitted).

106. *Id.* ¶ 15.

107. *Id.* ¶ 22.

108. Pierre de Vos, *Same-Sex Marriage, the Right to Equality and the South African Constitution*, 11 S. AFR. PUB. L. 355, 361 (1996) (quoting BARNARD ET AL., *THE SOUTH AFRICAN LAW OF PERSONS AND FAMILY LAW* 149 (3rd ed. 1994)).

the right to marry only to heterosexual couples.

A. THE RIGHT TO EQUALITY

Based on the Court's jurisprudence under the Bill of Rights and the strong precedents set forth by the Sodomy, Immigration, and Spousal Benefits Cases, an analysis of same-sex marriage under the equality provision is relatively straightforward. The first step in the analysis requires a determination that the law differentiates between people or categories of people.¹⁰⁹ In the Immigration and Spousal Benefits Cases, the Court found that the failure of the law to extend the same benefits to same-sex partners that the law extended to spouses constituted differentiation.¹¹⁰ The opportunity to enter into a legal marriage allows its participants to receive significant legal, economic, and social benefits,¹¹¹ the denial of which constitutes an extraordinary deprivation.¹¹² To deny these benefits specifically to gays and

109. See *supra* notes 27-28 and accompanying text.

110. See *supra* notes 83, 103 and accompanying text.

111. These benefits include: the right to make life and death decisions for each other, Bradley Silver, *Til Deportation Do Us Part: The Extension of Spousal Recognition to Same-Sex Partnerships*, 12 S. AFR. J. ON HUM. RTS. 575, 575 (1996); the right to inheritance; to adopt or be foster parents; to medical insurance coverage; to bring a wrongful death action; the right to make life and death decisions for each other; and the right to inheritance. Tshepo L. Mosikatsana, *The Definitional Exclusion of Gays & Lesbians from Family Status*, 12 S. AFR. J. ON HUM. RTS. 549, 556 (1996). In addition, married couples receive private benefits, such as health insurance and benefits packages from employers. Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, in WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER AND THE LAW* 818, 819 (1997). Marriage also includes significant social benefits. By marrying, heterosexual couples make a public commitment and receive public recognition of that commitment. Mosikatsana, *supra*, at 557. As described by the Immigration Case, marriage "creates a physical, moral and spiritual community of life." Nat'l Coalition for Gay and Lesbian Equal. v. Minister of Home Affairs, 2000 (2) SALR 1, 29 (CC) (quoting JUNE D. SINCLAIR & JACQUELINE HEWTON, *THE LAW OF MARRIAGE* 422 (1996)). This "community" is denied to homosexuals because they cannot marry.

112. Jonathan Rauch, *For Better or Worse?*, NEW REPUBLIC, May 6, 1996, at 19. Although some of the legal and financial benefits of marriage can be achieved through alternative means, such as by will, contract, or power of attorney, many of these benefits can only be realized through legally recognized marriage. See Craig Lind, *Sexual Orientation, Family Law and the Transitional Constitution*, 112 S. AFR. L.J. 481, 486 (1995). In addition, even if a same-sex couple had the awareness and financial ability to make such legal arrangements, they would still have legitimate concerns as to whether such documents or contracts would survive legal challenges from extended

lesbians, therefore, is to differentiate between people or categories of people in violation of the equality provision of the Constitution.

The second step in an equality analysis is to determine whether this differentiation amounts to discrimination.¹¹³ Similar to the Sodomy, Immigration, and Spousal Benefits Cases, allowing heterosexual couples, but not same-sex couples, to marry constitutes differentiation based on sexual orientation.¹¹⁴ Because sexual orientation is a specified ground listed in the equality provision, discrimination is presumed.¹¹⁵

The next inquiry will be whether the discrimination is unfair.¹¹⁶ Discrimination based on a ground listed in the equality provision is presumed to be unfair unless it is established otherwise.¹¹⁷ Although this is the step in the analysis that drew most of the Court's attention in the Sodomy and Immigration Cases, those precedents and the government's concession of unfairness in the Spousal Benefits Case should simplify this step in a marriage case. In determining whether discrimination is fair, the Court has focused on the goal of the equality provision to prevent patterns of group disadvantage that result from discrimination.¹¹⁸ Using the substantive view called for by the Constitution and used in the previous cases, this analysis should not focus on a claim that homosexuals are *different*, but that they have been *treated differently*.¹¹⁹ In other words, the Court should continue to be unwilling to discuss whether gays and lesbians *should* be homosexual or whether they *should* get married. Instead, the focus should be on the significant impact the marriage laws have on homosexuals and on society's treatment of homosexuals.¹²⁰

Marriage is society's most sacred and revered institution.¹²¹ For many people, the day they get married is one of the most important days in their lives, filled with

family or other interested parties, especially in the event of the death of one of the partners. See Mosikatsana, *supra* note 111, at 557.

113. See *supra* note 29 and accompanying text.

114. See *supra* notes 64, 83-84, 103 and accompanying text.

115. See *supra* note 30 and accompanying text.

116. See *supra* note 31 and accompanying text.

117. See *supra* note 32 and accompanying text.

118. See *supra* note 59 and accompanying text.

119. See *supra* note 62 and accompanying text.

120. See *supra* notes 25-26, 65-66, 85 and accompanying text.

121. Stoddard, *supra* note 111, at 819.

extraordinary meaning and symbolism. To deny homosexuals the opportunity to participate in this fundamental institution is to treat homosexual couples differently. This different treatment sends a message that gay relationships are somehow less significant and less valuable than heterosexual relationships.¹²² The marriage laws unfairly deny significant benefits to gays and lesbians and this denial demeans homosexual relationships and fosters further discrimination of homosexuals in society. In addition, the recognition of same-sex marriage would serve to "normalize" lifelong homosexual relationships.¹²³ This in turn would both stabilize the relationships themselves and would "facilitate greater social acceptance of same-sex relationships in general."¹²⁴ For these reasons, the Court should find the discrimination to be unfair and the ban on same-sex marriage to be a violation of the right to equality.

B. THE RIGHTS TO HUMAN DIGNITY AND PRIVACY

The ban on same-sex marriage also violates the fundamental rights to human dignity and privacy. It is degrading and devaluing to homosexuals when the law recognizes heterosexual marriage, but fails to recognize homosexual marriage. It keeps homosexuals from conducting their relationships with the same amount of social recognition and human dignity as is afforded to heterosexuals. It says to homosexuals that they, and their relationships, are inferior in violation of the right to human dignity.¹²⁵

The Court in the Sodomy Case also held that the right to privacy grants everyone the right to "establish and nurture human relationships without interference from the outside community."¹²⁶ The right to privacy, therefore, not only protects what happens behind closed doors, but also includes individual decisions about one's personal life, even if they are shared with the community. In this way, the right to privacy grants homosexuals the right to choose their partner and to have that partner recognized and acknowledged by the

122. *Id.*

123. de Vos, *supra* note 108, at 357.

124. *Id.* at 359; see also Mosikatsana, *supra* note 111, at 557 (discussing the intangible benefits that arise from marriage).

125. See Brenda Grant, *Homosexual Marriage and the Constitution*, 12 S. AFR. J. ON HUM. RTS. 568, 570-71 (1996).

126. See *supra* note 72 and accompanying text.

community.

C. THE LIMITATIONS CLAUSE

Although the analysis under the rights to equality, human dignity, and privacy favors same-sex marriage, the respondents are allowed to try to save the limitation from unconstitutionality by showing that the limitation is justifiable and reasonable.¹²⁷ In arguing against the precedents created in the Sodomy, Immigration, and Spousal Benefits Cases, the government will find their strongest arguments not in the text of the Constitution or the decisions of the previous cases, but in the social framework of society and the traditional understanding of marriage. In arguing that limiting the rights to equality, dignity, and privacy is reasonable and justified when it comes to same-sex marriage, the government may put forward several arguments which could be defeated as follows.

1. Marriage Is Not by Definition Heterosexual

Advocates for same-sex marriage often are told that marriage is by definition between a man and a woman.¹²⁸ This statement actually puts forth a conclusion rather than an argument. It is actually debatable whether marriage has always been defined as between a man and a woman.¹²⁹ William N. Eskridge has compiled research from several academic fields to document the history of same-sex unions.¹³⁰ He has evidence of the legal recognition of same-sex relationships from all over the world dating from ancient Egypt to modern day.¹³¹ This includes “woman marriages” in South, West, and East Africa,¹³² which were referred to by the Court in the Spousal Benefits Case.¹³³

Still, even if marriage has not always been defined as

127. See *supra* notes 42-46 and accompanying text.

128. de Vos, *supra* note 108, at 364; see also Andrew Sullivan, *State of the Union*, NEW REPUBLIC, May 8, 2000, at 20 (noting that a common argument against same-sex marriage is the historical definition of marriage as between a man and a woman).

129. See WILLIAM N. ESKRIDGE, *THE CASE FOR SAME-SEX MARRIAGE* 15-50 (1996); ANDREW SULLIVAN, *SAME-SEX MARRIAGE: PRO AND CON* 3-45 (1997).

130. ESKRIDGE, *supra* note 129, at 15-50.

131. *Id.*

132. *Id.* at 35.

133. *Satchwell v. President of the Republic of S. Africa*, No. CCT 45/01, ¶ 12 (CC July 25, 2002), <http://www.concourt.gov.za/judgments/2002/satchwell.pdf>.

between one man and one woman, it is true that marriage has been defined that way in South Africa and much of the world for a very long time. This, however, does not mean that marriage is inherently between a man and a woman. Marriage is an institution that has been created by society and reflects the values and attitudes of the society around it.¹³⁴ Marriage does not have essential elements, but is actually dynamic and changes with other institutions in society.¹³⁵ In other words, there is no *neutral* definition of marriage.

This reality is evidenced by the fact that civil marriage has undergone vast changes in South Africa and throughout the world.¹³⁶ As author Andrew Sullivan notes, if marriage were the same today as it has been for the past 2,000 years, it would be possible to "marry a twelve-year-old you had never met, to own a wife as property and dispose of her at will, or to imprison a person who married someone of a different race."¹³⁷ As South Africa's Apartheid history proves, a "long historical pedigree does not establish the legitimacy of a state definition or policy."¹³⁸ Just as the antimiscegenation laws reflected the racist beliefs of Apartheid South Africa, when those racist beliefs changed, the marriage laws changed with them. The Court in the Spousal Benefits Case addressed this exact issue when it stated that "[t]he definition of the family . . . changes as social practices and traditions change."¹³⁹ The fact that South African law prohibits same-sex marriage is a reflection of society's past persecution of homosexuals. As evidenced by the Constitution and the cases previously discussed, South Africa has moved away from its past oppression of homosexuals. Accordingly, South Africa should change its marriage laws to reflect this larger change.

134. See William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1434 (1993) (citing E.R. LEACH, *RETHINKING ANTHROPOLOGY* 105 (1961)). According to anthropologist Edmund R. Leach, marriage can only be defined as one or more of the following: "(1) the rights and duties inhering in spousedom, (2) the personal relationship between people considered spouses, and/or (3) relationships and alliances created or cemented by espousal." *Id.* All of these definitions could, and based on Professor Eskridge's research, arguably have included same-sex couples.

135. See de Vos, *supra* note 108, at 371.

136. Sullivan, *supra* note 128, at 20.

137. *Id.*

138. MARK STRASSER, *LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION* 6 (1997).

139. See *supra* note 105 and accompanying text.

2. Same-Sex Marriage Does Not Violate Religious Tenets

Another possible argument as to why the ban on same-sex marriage is justifiable is that same-sex marriage violates religious tenets.¹⁴⁰ This argument, however, fails to recognize that religion does not govern civil marriage.¹⁴¹ Just as civil law allows divorce even though some churches forbid it, so too could civil law allow same-sex marriage while some churches forbid it.¹⁴² When the Court faced a similar religious challenge in the Sodomy Case, it held that religious beliefs could not be imposed on all of society, nor could religious doctrine dictate constitutional protections.¹⁴³ State recognition of same-sex marriage would not require faith communities to change their definitions of marriage.¹⁴⁴

3. Marriage Is Not Only for Procreation

A third justification often put forth for banning same-sex marriage is based on procreation.¹⁴⁵ That is, marriage, being primarily about procreation, should be reserved for heterosexual couples.¹⁴⁶ This argument should fail, however, because the "physical ability to procreate has never been a requirement for marriage."¹⁴⁷ Civil marriage is granted to "childless couples, sterile couples, couples who marry too late in life to have children, [and] couples who adopt other people's children."¹⁴⁸ No one would make the argument that heterosexual couples that are unable to procreate, because of sterility, impotence, or age, should not be able to marry because the primary purpose of marriage cannot be met.¹⁴⁹ In the

140. de Vos, *supra* note 108, at 364.

141. See Sullivan, *supra* note 128, at 20.

142. *Id.*

143. See *supra* notes 76-78 and accompanying text.

144. Sullivan, *supra* note 128, at 20.

145. de Vos, *supra* note 108, at 365; see Sullivan, *supra* note 128, at 20.

146. Sullivan, *supra* note 128, at 20.

147. Pamela S. Katz, *The Case for Legal Recognition of Same-Sex Marriage*, 8 J.L. & POL'Y 61, 99 (1999).

148. Sullivan, *supra* note 128, at 20. See also Rauch, *supra* note 112, at 22 stating that

[i]f the possibility of children is what gives meaning to marriage, then a post-menopausal woman who applies for a marriage license should be turned away at the courthouse door. What's more, she should be hooted at and condemned for stretching the meaning of marriage beyond its natural basis and so reducing the institution to frivolity.

Id.

149. Grant, *supra* note 125, at 569.

Immigration Case, the Court was unwilling to view procreative potential as a justification for marriage.¹⁵⁰ The Court held that such a view would demean marriages between couples that chose not to or were unable to have children.¹⁵¹ In the Sodomy Case, Justice Ackermann acknowledged that some people sincerely believe that sexual expression should be limited to marriage with procreation as the sole purpose, but while respecting that belief, the Court held that this belief could not "influence what the Constitution dictates in regard to discrimination on the grounds of sexual orientation."¹⁵²

4. Recognizing Same-Sex Marriage Would Not Weaken the Institution of Marriage

A fourth justification that could be put forth is that recognizing same-sex marriage would weaken the institution of marriage as a whole.¹⁵³ This argument operates under the assumption that the value of heterosexual marriage is dependent upon the deprivation of that right to certain groups of people in society.¹⁵⁴ This argument should fail because "secur[ing] the rights of a majority by eviscerating the rights of a minority is the opposite of what a liberal democracy is supposed to be about."¹⁵⁵ Indeed, to assert that granting a gay couple the right to marry would weaken a straight couple's commitment to marriage implies that homosexuals are so "inherently depraved and immoral" that to allow them to marry would "inevitably spoil, even defame, the institution of marriage."¹⁵⁶ This argument is contrary to the Court's goal of condemning stereotypes. The Court held in the Sodomy Case that there is no single or superior perspective for judging who is normal.¹⁵⁷ In addition, the Court stated in the Immigration Case that protecting the traditional institution of marriage could not be done in a way that limits the constitutional rights

150. See *supra* note 90 and accompanying text.

151. See *supra* note 90 and accompanying text.

152. Nat'l Coalition for Gay and Lesbian Equal. v. Minister of Justice, 1999 (1) SALR 6, 32 (CC).

153. Sullivan, *supra* note 128, at 21; see also de Vos, *supra* note 108, at 364 (refuting definitional and moral arguments against same-sex marriage).

154. Sullivan, *supra* note 128, at 20.

155. *Id.* at 21.

156. *Id.*

157. See *supra* note 76 and accompanying text.

of same-sex life partners.¹⁵⁸ The argument that heterosexual marriage is “normal” and allowing gays to marry would somehow weaken marriage is, therefore, not a reasonable justification.

5. Gays and Lesbians Are Not “Free” to Marry Someone of the Opposite Sex

Another argument often used to support the ban on same-sex marriage is that gays and lesbians are not discriminated against because they are not prohibited from marrying someone of the opposite sex.¹⁵⁹ The Court dismissed this argument in the Immigration Case when it held that gays and lesbians have a right to express themselves in a relationship that is in “harmony with their sexual orientation.”¹⁶⁰ The Sodomy Case recognized that sexual orientation is a part of a homosexual’s personhood and not something that can be fragmented.¹⁶¹ Justice Sachs declared that the state cannot arrange for someone’s partner, but instead that partners have the right to choose themselves.¹⁶²

The rights being limited by the ban on same-sex marriage are the rights to equality, dignity, and privacy. These rights are fundamental to the Constitution and, in the case of equality and dignity, “are important rights going to the core of South Africa’s constitutional democratic values.”¹⁶³ The justifications discussed on behalf of the ban are not reasonable under the new Constitution.¹⁶⁴ They are rooted in outdated conceptions of

158. See *supra* note 98 and accompanying text; see also Sullivan, *supra* note 128, at 21.

159. de Vos, *supra* note 108, at 366.

160. See *supra* notes 94-96 and accompanying text.

161. Nat’l Coalition for Gay and Lesbian Equal. v. Minister of Justice, 1999 (1) SALR 6, 27 (CC) (noting that discrimination against gay men has a severe impact on their dignity, personhood, and identity).

162. See *supra* note 73 and accompanying text.

163. Nat’l Coalition for Gay and Lesbian Equal. v. Minister of Home Affairs, 2000 (2) SALR 1, 34 (CC).

164. See, e.g., Lind, *supra* note 112, at 495. Lind writes,

While South Africa did not have a constitutional requirement of equal treatment, arguments based on equality would have encountered opposition based on a tradition of legal and social repugnance towards homosexual conduct. But arguments of that nature are no longer feasible. Our Constitution interrupts our tradition of prejudice to create an atmosphere of respect for difference within our society. That respect entitles homosexuals to the same rights that heterosexuals enjoy through their ability to enter legally accepted domestic relationships.

family and procreation that are no longer valid or true. In addition, these arguments are not justifiable in an open and democratic society because they focus on stereotypes and result in prejudice towards a vulnerable group.¹⁶⁵ The Constitutional Court has already rejected these arguments in previous cases for just these reasons. The Court stated in the Sodomy Case that although the Constitution cannot destroy homophobic prejudice, it can require the "elimination of public institutions which are based on and perpetuate such prejudice."¹⁶⁶ In addition, the Court held that enforcing the moral views of even a majority of the community cannot qualify as a legitimate purpose if those views are based on prejudice.¹⁶⁷

D. INTERNATIONAL AND FOREIGN LAW

Pursuant to section 39 of the Constitution, the Court is required to look at international law when determining whether the common law ban on same-sex marriage violates the Constitution.¹⁶⁸ Although the Universal Declaration of Human Rights and the other principal human rights instruments drafted by the United Nations do not explicitly mention sexual orientation or same-sex marriage, they have created a comprehensive body of human rights law that protects all people.¹⁶⁹ These documents set out general

Id. (citations omitted).

165. *See id.* at 499. Lind writes,

Prime amongst the factors to which other national courts have looked in deciding whether or not a restriction on freedom is "justifiable in an open and democratic society based on freedom and equality" is the respect which democratic societies have for the "inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, and faith in social and political institutions which enhance the participation of individuals and groups in society." Democratic societies balance the wishes of individuals against the greater good of society by acknowledging "the importance of the individual, and the undesirability of restricting his or her freedom."

In following these approaches, a South African court should be loath to restrict the right of homosexuals to enjoy the family rights which heterosexuals have, with little interference, enjoyed for centuries.

Id. (citations omitted).

166. *See Nat'l Coalition for Gay and Lesbian Equal. v. Minister of Justice*, (1) SALR at 66-67.

167. *See supra* note 69 and accompanying text.

168. *See supra* note 46 and accompanying text.

169. Dr. Biong Deng, Human Rights of Gays and Lesbians and the United Nations, Address Before the Facing the Mask Workshop (Nov. 29, 2001),

protections that are significant to gays and lesbians including freedom from discrimination, the right to privacy, the right to equality under the law, and the right to security of person.¹⁷⁰ In addition, the Immigration Case acknowledged that there is an international trend towards a redefinition of family that includes an increased understanding and sensitivity “towards human diversity in general and to gays and lesbians and their relationships in particular.”¹⁷¹

Section 39 of the Constitution also states that the Court may consider foreign law when interpreting the Bill of Rights.¹⁷² The Netherlands was the first country to grant gays and lesbians the same marriage benefits granted to heterosexual couples.¹⁷³ Several countries, however, have granted homosexual relationships status akin to marriage, including Germany, Australia, France, Sweden, Norway, Hungary, Brazil,¹⁷⁴ Portugal,¹⁷⁵ Denmark, Greenland, and

available at <http://www.mask.org.za/sections/AfricaPerCountry/southern africa/un/htm.un/> (on file with author).

170. *Id.*, <http://www.mask.org.gov/sections/AfricaPerCountry/southern africa/un/htm.un/> (on file with author); see also Laurence R. Helfner, *Will the United Nations Human Rights Committee Require Recognition of Same-Sex Marriages?*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW, *supra* note 3, at 734 (noting the United Nations Human Rights Committee’s unanimous conclusion that an Australian ban on same-sex consensual sodomy violated the privacy and nondiscrimination rights outlined in the International Covenant on Civil and Political Rights); Kristen L. Walker, *United Nations Human Rights Law and Same-Sex Relationships: Where to from Here?*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW, *supra* note 3, at 743-57 (describing the potential use of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of the Child in arguing for gay and lesbian rights).

171. Nat’l Coalition for Gay and Lesbian Equal. v. Minister of Home Affairs, 2000 (2) SALR 1, 30-31 (CC).

172. See *supra* note 46 and accompanying text.

173. Press Release, Lambda Legal Def. and Educ. Fund, Netherlands Ends Discrimination in Civil Marriages: Gays to Wed (Mar. 30, 2001), at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=814> [hereinafter Lambda Press Release].

174. Michael Anders, *Revolutionary First Gay “Marriages” Take Place in Germany*, AGENCE FRANCE-PRESSE, Aug. 1, 2001, available at 2001 WL 24982235 (listing nations recognizing domestic partnership).

175. International Recognition of Same-Sex Partnerships, Marriage Project Fact Sheet (Lambda Legal Def. and Educ. Fund, New York, N.Y.), Mar. 30, 2001, at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=432> [hereinafter International Recognition].

Iceland.¹⁷⁶ In addition, courts have recognized the “marital nature” of committed homosexual relationships in Columbia, Hungary, Israel, and Namibia.¹⁷⁷ In the United States, the Vermont Supreme Court ruled that the exclusion of same-sex couples from marriage benefits and protections violated the state Constitution.¹⁷⁸ Most recently, the Ontario Superior Court held that Canada’s refusal to legally recognize same-sex marriages was unconstitutional and gave the federal Parliament two years to redefine the term marriage in the Canadian law.¹⁷⁹ Similar to the Sodomy Case, the Court should again find that “[t]here is nothing in the jurisprudence of other open and democratic societies based on human dignity, equality, and freedom which would lead [the Court] to a different conclusion.”¹⁸⁰

E. CIVIL UNIONS

Due to the strong constitutional and precedential arguments against limiting the right to marry only to heterosexual couples, the government may adopt a different strategy in opposing the recognition of same-sex marriage. Instead of arguing that the Constitution does not require recognizing same-sex marriage, the government might concede that South Africa must legally recognize same-sex relationships, but argue that rather than calling them “marriages,” the Court should create a legal classification such as domestic partnership or civil union. This classification

176. Lambda Press Release, *supra* note 173, at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=814>. Several other countries are considering recognition of same-sex partnerships including Switzerland, Spain, Belgium, Finland, Luxembourg, New Zealand, and the Czech Republic. International Recognition, *supra* note 175, at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=432>; see also William N. Eskridge, Jr., *Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition*, 31 MCGEORGE L. REV. 641, 663-70 (2000) (listing a country-by-country survey of laws relating to sexual minorities).

177. Lambda Press Release, *supra* note 173, at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=814>.

178. Mark E. Wojcik et al., *International Human Rights*, 34 INT’L LAW. 761, 778 (2000).

179. *Ontario Court Orders Government to Recognize Gay, Lesbian Marriages*, STAR TRIB., July 13, 2002, at A8. The government is expected to appeal the ruling, and it is anticipated that Canada’s Supreme Court will hear the case in the end. *Id.*

180. Nat’l Coalition for Gay and Lesbian Equal. v. Minister of Justice, 1999 (1) SALR 6, 32 (CC).

would confer on homosexuals all the same legal benefits as marriage, but would exist under a different name.¹⁸¹

It is true that in many ways, marriage actually includes two institutions.¹⁸² One is legal and involves specific legal consequences, responsibilities, and privileges; the other is moral and involves religious and social validation. Perhaps it would be better if the moral and religious institution were called marriage and the legal counterpart, domestic partnership.¹⁸³ Although stripping religious marriages of any civil recognition for both heterosexual and homosexual couples would provide a "neutral" solution, it is very unlikely to occur because marriage is such an established and socially entrenched institution. Instead, the Court will have to consider whether it would be constitutional to create a separate institution just for homosexuals.

The South African Constitution calls for the elimination of discrimination on practically all levels. The equality provision, in particular, reflects this goal. The equality provision, "is the legacy of the anti-apartheid struggle which created a serious commitment to the elimination of discrimination on any basis."¹⁸⁴ Marriage is a powerful institution that confers on its

181. Pierre de Vos, Associate Professor of Law at the University of the Western Cape, hypothesized that the government may use just such a strategy:

The argument that will be made by the government . . . would not be to say that [same-sex partnerships are an] abomination, but to say, yes, one must accommodate same-sex couples and therefore there must be some sort of partnership regulation or law. There must be something, but obviously not marriage.

Interview with Pierre de Vos, Associate Professor of Law, University of the Western Cape, in Bellville, South Africa (July 19, 2001), at 2 (transcript on file with author).

182. See Lind, *supra* note 112, at 484-85.

183. *Id.* Ananda Louw, a researcher at the South African Law Commission agrees:

Sometimes I think what one should do in South Africa is just to deregulate marriage and make it a completely personal situation that you do according to . . . your own religion, . . . completely separated from the state because of the fact that there are so many different religions and cultures and so forth. It's [a] very difficult thing to define what we're talking about. It's very difficult to find one way that would be acceptable.

Interview with Ananda Louw, Researcher, South African Law Commission, in Pretoria, South Africa (July 24, 2001), at 5 (transcript on file with author).

184. Joe Patrick Bean, *South Africa Pioneers Protection of Gay Rights*, SAN ANTONIO EXPRESS NEWS, Mar. 13, 1997, available at 1997 WL 3164736 (quoting the National Coalition for Lesbian and Gay Equality).

participants a complex web of rights and benefits, both legal and social. The social context of marriage is a large part of what gives it a privileged status.¹⁸⁵ To grant gays and lesbians the legal rights, but not the social status, would be to deny them substantive equality.¹⁸⁶ To concede that same-sex couples have a right to the legal benefits of marriage, but then withhold the name and thereby the social benefits of marriage, would be to engage in an "act of pure stigmatization."¹⁸⁷ Justice Yacoob of the Constitutional Court points to just such a possibility:

If you are to recognize the dignity of human beings, and if the dignity of a human being is to take into account what that human being is, surely it's an affront to the dignity of the human being who has a homosexual . . . orientation to say that their relationship is worth less than the relationship of couples who are different sexes.¹⁸⁸

Just as creating a separate institution for marriages between black couples would have been unconstitutional, it would be unconstitutional to allow heterosexual couples to marry, but allow homosexual couples only access to civil unions. As long as legal marriages are recognized for heterosexual couples, then the creation of a civil union for same-sex couples would be unconstitutional in South Africa.

CONCLUSION

The South African Constitution is unlike any other in the world in terms of its inclusion of sexual orientation. The Constitutional Court has taken a clear position in interpreting the Bill of Rights and implementing its goal of protecting individuals and groups from discrimination. The Sodomy, Immigration, and Spousal Benefits Cases demonstrate that the Constitutional Court recognizes that homosexuals have a Constitutional right to equality, human dignity, and privacy, and that the Court is willing to protect gays and lesbians from discrimination and social prejudice.

South Africa has already learned that separate but equal "was a failed and pernicious policy with regard to race; it will be a failed and pernicious policy with regard to sexual

185. Ronald Louw, *Gay and Lesbian Partner Immigration and the Redefining of Family*: National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs, 16 S. AFR. J. ON HUM. RTS. 313, 322 (2000).

186. *Id.* at 321.

187. Sullivan, *supra* note 128, at 20.

188. Interview with Zakeria Mohammed Yacoob, Justice, South African Constitutional Court, in Cape Town, South Africa (July 18, 2001), at 2 (transcript on file with author).

orientation" as well.¹⁸⁹ Prohibitions against same-sex marriage preserve, and even foster, the subordination of homosexuals in South African society. When the state refuses to treat homosexuals equally under the law, it perpetuates the perception of gays as immoral, deviant, and unworthy. As Justice Ackermann so simply, yet strongly, articulated in the Sodomy Case, "Like justice, equality delayed is equality denied."¹⁹⁰ In many ways, admission to the institution of marriage—both in name and function—may constitute the most important test for determining the extent to which gays and lesbians will be treated equally in South Africa. The only acceptable solution under the new Constitution is to extend gays and lesbians the right to marry. Anything less, would be unconstitutional.

189. Sullivan, *supra* note 128, at 18.

190. Nat'l Coalition for Gay and Lesbian Equal. v. Minister of Justice, 1999 (1) SALR 6, 39 (CC).